

A Chan Eng Keat v Liang Zhi Qiang & Anor

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12B-686 OF
2010

B VARGHESE GEORGE JC
5 DECEMBER 2011

C *Damages (Personal injury or death) — Personal injuries — Loss of earning capacity — Whether court may award damages for loss of earning capacity notwithstanding rejection of claim for loss of future earnings*

D *Damages (Personal injury or death) — Personal injuries — Loss of future earnings — Assessment of — Computation of multiplicand and multiplier — Whether s 28A(2)(d)(i) of the Civil Law Act 1956 provides for fixed multiplicand — Whether court has discretion to vary multiplicand*

E The appellant/plaintiff appealed against the decision of the learned sessions judge arising from a motor vehicle accident. The appeal was against the quantum of ‘loss of future earnings’, more specifically the years of purchase or multiplicand applied to derive the same. The multiplicand used by the learned sessions judge was five years on the grounds that the plaintiff would be able to obtain a better paying job in the future as he was a young man aged 18 years at the time of the accident. The evidence showed that although the appellant was now employed on a lower salary, the prospects of a ‘loss of earnings’ being suffered by the appellant was definite as his medical assessment indicated that he would be unable to stand for long in whatever job he was engaged in.

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G Counsel for the appellant contended that s 28A(2)(d)(i) of the Civil Law Act 1956 (‘the Act’) made it mandatory that 16 years should be the multiplicand to be applied in all cases where the injured is below 30 years of age and where it has been established that he would suffer ‘loss of earnings’. It was argued that the court has no discretion following the use of the word ‘shall’ in s 28A(2)(d)(i) and the court should ‘automatically’ apply a 16 years multiplicand in all such situations.

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Held:

I (1) Section 28A(2)(c) and (2)(d) of the Act are in respect of ‘damages for loss of future earnings’ and must be read together. The tone of the language used in those two statutory subprovision (‘shall take into account’, in assessing damage’) do not take away the basic principle that the court is vested with the authority and discretion to quantify damages for loss of future earnings where on evidence ‘a real and assessable loss’ had been established (see para 16).

- (2) Section 28A(2)(d) of the Act is not to be read in isolation but together with the scheme of the other provisions of s 28A and in that larger context, the court still retains the inherent authority to make 'assessment' and/or 'quantification' as may be necessary depending on the facts of each particular case before it, provided always that the limit of the number of years' purchase where the injured is 30 years or less at the time of the accident, should not exceed 16 years' purchase for any damages awarded for 'loss of future earnings'. Section 28A(2)(d)(i) of the Act, does not impose an absolute 16 years purchase in all such cases, without any residual authority in the court to determine the number of years of purchase as may be reasonable in each particular case. The 16 years' purchase stipulated therein is the maximum numbers of years' purchase (multiplicand) set by the Legislature in such cases where the injured is below the age of thirty years at the date of the accident. This is the inevitable result that one would have when the whole of s 28A is given a purposive reading (see para 17). A
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- (3) It is trite that ordinarily the use of the word 'shall' implies a mandatory obligation but that is not an absolute rule. The use of the word 'shall' in Section 28A(2)(d)(i) does not connote a stipulation of a mandatory nature in the sense that in all such cases a 16 years' purchase has to be applied. Taking into consideration the scope and purpose of s 28A overall, the tenor of the language used and the context in which the word 'shall' is used, the intention of the Legislature behind s 28A(2)(d)(i) is to set a limit only to number of years' purchase to be 'considered' in each of such cases involving an injured below 30 years of age; *Marappan & Anor v Siti Rahimah bt Ibrahim* [1950] 1 MLJ 995 distinguished (see para 19). E
F
- (4) Considering that the appellant was and could be employed gainfully, a fair and reasonable number of years' of purchase was eight years instead of the five years' purchase. With two years of the eight years already compensated, the multiplicand to be applied was six years. This was not a case where the injured was not 'employable' at all or a total loss of future earnings was the case. There was no total loss here of the prospects of future employment and the evidence was that the appellant had secured a job at a lower salary (see para 22). G
- (5) The appellant alternatively was entitled to be compensated, more appropriately, under the head of 'loss of earning capacity'. Notwithstanding the rejection of a claim for 'loss of future earnings', it is still open to the court to make an award of damages under the head of 'loss of earning capacity'. Alternatively therefore, the appellant was still to be paid damages in the some sum of RM54,000 under the head 'loss of earning capacity' (see para 22 & 23). H
I

[Bahasa Malaysia summary]

Perayu/plaintif merayu terhadap keputusan hakim sesyen yang bijaksana yang timbul daripada kemalangan kenderaan motor. Rayuan adalah terhadap

- A kuantum 'kehilangan pendapatan masa depan', atau secara spesifiknya tahun-tahun belian atau "multiplicand" yang digunakan untuk mendapatkannya. 'Multiplicand' yang digunakan oleh hakim mahkamah sesyen adalah lima tahun atas alasan bahawa plaintif boleh mendapatkan kerja dengan pendapatan yang lebih baik pada masa hadapan memandangkan dia
- B merupakan seorang lelaki muda berusia 18 tahun pada masa kemalangan. Keterangan menunjukkan bahawa walaupun perayu diambil bekerja pada gaji yang lebih rendah, kemungkinan 'kehilangan pendapatan' yang dialami oleh perayu adalah pasti memandangkan pemeriksaan kesihatannya menunjukkan bahawa dia tidak boleh berdiri untuk jangka masa yang lama dalam
- C mana-mana kerja yang dilakukannya. Peguamcara bagi pihak perayu menghujah bahawa s 28A(2)(d)(i) Akta Undang-Undang Sivill 1956 ('Akta') menjadikannya mandatori bahawa 16 tahun sepatutnya menjadi 'multiplicand' untuk digunakan di dalam semua kes di mana orang yang tercedera di bawah usia 30 tahun dan telah terbukti bahawa dia akan
- D mengalami 'kehilangan pendapatan'. Dipertikaikan bahawa mahkamah tidak mempunyai pertimbangan mengikut penggunaan perkataan 'akan' dalam s 28A(2)(d)(i) dan mahkamah seharusnya 'secara automatik' menggunakan 'multiplicand' 16 tahun di dalam keadaan tersebut.
- E **Diputuskan:**
- (1) Seksyen 28A(2)(c) dan (2)(d) Akta adalah mengenai 'ganti rugi kehilangan pendapatan masa depan' dan mesti dibaca bersama. Nada bahasa yang digunakan di dalam kedua-dua sub-peruntukan statutori ('akan mengambilkira', di dalam menilai ganti rugi') tidak menunjukkan
- F prinsip utama bahawa mahkamah diberikan kuasa dan pertimbangan untuk menjumlahkan ganti rugi untuk kehilangan pendapatan masa depan di mana keterangan 'kehilangan sebenar yang boleh diukur' telah dibuktikan (lihat perenggan 16).
- G (2) Seksyen 28A(2)(d) Akta tidak boleh dibaca secara berasingan tetapi bersama dengan skim peruntukan s 28A yang lain dan di dalam konteks yang lebih besar, mahkamah masih mengekalkan kuasa sedia ada untuk membuat 'penilaian' dan/atau 'penjumlahan' yang diperlukan bergantung ke atas fakta-fakta setiap kes di hadapannya, dengan syarat
- H bahawa had bilangan tahun-tahun belian di mana orang tercedera ialah 30 tahun atau kurang pada masa kemalangan, tidak melebihi 16 tahun belian untuk mana-mana ganti rugi yang diawardkan untuk 'kehilangan pendapatan masa depan'. Seksyen 28A(2)(d)(i) Akta tidak mengenakan 16 tahun mutlak di dalam kesemua kes tersebut, tanpa mana-mana kuasa
- I yang ada di dalam mahkamah bagi menentukan bilangan tahun-tahun belian yang munasabah dalam setiap kes. 16 tahun belian yang ditetapkan itu adalah bilangan maksimum belian tahunan ('multiplicand') yang ditetapkan oleh badan perundangan di dalam kes di mana orang tercedera adalah di bawah usia 30 tahun pada tarikh

kemalangan. Ini adalah keputusan yang tidak dapat dielakkan apabila keseluruhan s 28A diberikan pembacaan bertujuan (lihat perenggan 17).

- (3) Adalah merupakan undang-undang terpakai penggunaan perkataan 'akan' memberikan maksud kewajipan mandatori tetapi ia bukannya peraturan mutlak. Penggunaan perkataan 'akan' dalam s 28A(2)(d)(i) tidak melambangkan ketetapan yang bersifat mandatori bahawa di dalam kes tersebut 16 tahun belian perlu digunakan. Dengan mengambilkira skop dan tujuan s 28A secara keseluruhannya, nada bahasa yang digunakan dan konteks di mana perkataan 'akan' digunakan, tujuan badan perundangan di sebalik s 28A(2)(d)(i) ialah untuk menetapkan had hanya kepada bilangan tahun belian yang akan 'dipertimbangkan' dalam setiap kes melibatkan orang tercedera di bawah usia 30 tahun; *Marappan & Anor v Siti Rahimah bt Ibrahim* [1990] 1 MLJ 99 dibezakan (lihat perenggan 19).

- (4) Dengan mempertimbangkan bahawa perayu telah dan boleh diambil bekerja, tahun-tahun belian yang adil dan munasabah ialah lapan tahun berbanding belian lima tahun. Dengan dua daripada lapan tahun telah digantikan, 'multiplicand' yang akan digunakan adalah enam tahun. Ini bukanlah kes di mana orang yang tercedera tidak boleh 'diambil bekerja' sama sekali atau kehilangan pendapatan masa depan sepenuhnya. Tidak terdapat kehilangan sepenuhnya peluang pekerjaan masa depan dan keterangan bahawa perayu telah mendapat pekerjaan pada gaji yang lebih rendah (lihat perenggan 22).

- (5) Perayu secara alternatifnya berhak untuk diberi ganti rugi, secara bersesuaian di bawah tajuk 'kehilangan kebolehan bekerja'. Sekalipun tuntutan untuk 'kehilangan pendapatan masa depan' ditolak, ianya masih terbuka untuk mahkamah membuat award ganti rugi di bawah tajuk 'kehilangan kebolehan bekerja'. Oleh itu secara alternatifnya, perayu masih dibayar ganti rugi sebanyak RM54,000 di bawah tajuk 'kehilangan kebolehan bekerja' (lihat perenggan 22 & 23).]

Notes

For cases on loss of earning capacity, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 785–798.

For cases on loss of future earnings, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 807–842.

Cases referred to

Chang Chong Foo & Anor v Shivanathan [1992] 2 MLJ 473, SC (refd)
Marappan & Anor v Siti Rahimah bt Ibrahim [1990] 1 MLJ 99, SC (distd)
State of Haryana v Raghubir Dayal [1995] SCC (1) 133, SC (refd)
Sumarni v Yow Bing Kwong & Anor [2008] 1 MLJ 608; [2008] 3 CLJ 489, CA (folld)

A Legislation referred to

Civil Law Act 1956 s 28A, 28A(1), (2), (2)(a), (2)(b), (2)(c), (2)(c)(ii), (2)(c)(iii), (2)(d), (2)(d)(i)
Employment Act 1955 s 18

- B** *Rhina Bhar (Rhina Bhar & Associates) for the appellant.*
Thanaletchemi Ratnam (K Suganthi & Co) for the respondent.

Varghese George JC:**C**

[1] This was an appeal from the decision of a learned sessions judge given after trial arising from a motor vehicle accident. The appellant before me was the plaintiff in that lower court action.

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[2] The learned sessions judge had held that the defendants (the respondents here) were 100% liable for the accident. There was no appeal against that determination.

E

[3] The appeal before me was on the quantum of damages awarded by the sessions court and was limited essentially to two issues. They were in respect of:

(1) the quantification of the plaintiff's 'actual earnings' at the time of the accident'; and

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(2) the quantum of the 'loss of future earnings' ordered by the sessions court, more specifically the years of purchase or multiplicand applied to derive the same.

LOSS OF ACTUAL EARNINGS**G**

[4] The appellant's contention was that 'actual earnings' of the appellant should have been at the rate of *RM1,300 per month* and not at RM750 per month as determined by the learned sessions judge and awarded for the two years (24 months), namely the period between the date of the accident and the date the appellant subsequently secured an alternative employment.

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[5] There was evidence before the sessions court that the appellant had only been employed for 15 days at the rate of RM50 per day (making a total of RM750 actually earned) At the time the accident occurred. The learned sessions judge had used this sum of RM750 as 'actual earnings' and applied it for the said 24 months the appellant was unemployed.

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I found this to be an error on the part of the learned sessions judge and held that the rate to be utilised should be '*actual earnings worked out on a monthly basis*'. The earning of RM50 per day should have been converted and accepted as

RM1,300 per month based on the widely accepted employment criteria of a 26 – *working days* in a month (see s 18 of the Employment Act 1955; *Chang Chong Foo & Anor v Shivanathan* [1992] 2 MLJ 473 at p 476).

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In the event, the award for loss of actual earnings for the 24 month period would work out to be RM31,200 and not RM18,000 as adjudged by the session court.

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(This aspect of my judgment is not the subject of the appeal to the Court of Appeal.)

[6] It followed then that *partial 'loss of actual earning'* from February 2010 (when the appellant found a job for a lower salary of RM550 per month) should have been *a loss of RM750 per month* (RM1,300 less RM550) and not at the rate of RM150 per month only (RM750 less RM550), as calculated by the learned sessions judge, that is with a further deduction of RM50 per month being made for 'living expenses'.

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[7] The learned sessions judge deducted the said RM50 per month for 'living expenses' from the RM750 (per month) ie the sum he had wrongly calculated as 'actual earnings'. (The actual earnings', as have been now held by me should in any case have been RM1,300 — per month.)

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In my judgment, I had held that the learned session judge, was clearly not entitled to deduct the 'living expenses' of RM50 per month since this was statutorily prohibited by s 28A(2)(c)(iii) of the Civil Law Act 1956 ('Act') (see *Marappan & Anor v Siti Rahimah bt Ibrahim* [1990] 1 MLJ 99). There was also no evidence whatsoever to support this 'assumed' quantum of living expenses in the first place

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(This aspect of my judgment is also not the subject of the appeal to the Court of Appeal)

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LOSS OF FUTURE EARNINGS

[8] The learned sessions judge, as can be observed from the *alasan penghakiman* (pp 43–47 of *rekod rayuan*), ordered a total sum of RM9,000 as loss of earnings for five years, derived as follows: RM150 x 12 months x five years (it appears that there was a miscalculation by the learned session judge when he referred to the current pay of the appellant as 'RM500/-', when it ought to have been RM550).

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Be that as it may, the years' of purchase or multiplicand used was 'five (5) years' and the justification for that is reflected in the following statement in the grounds of decision of the learned sessions judge:

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... that the plaintiff will be able to obtain a better paying job in the future as he is a young man aged 18 years at the time of the accident.

A [9] After having given due consideration to the submissions of respective counsel and the provision of s 28A of the Act in particular, I had held that:

B (a) the learned sessions judge was clearly in error when he gave regard to the likelihood of the appellant furthering his studies and obtaining a better qualification, since any such probable eventuality had been expressly precluded from any consideration by the court by the unambiguous provisions of s 28A(2)(c)(ii) of the Act; and

C (b) reading s 28A(2)(c) and s 28A(2)(a) of the Act together, the powers vested in the court to determine the number of years' of purchase had not be curtailed by s 28A(2)(d)(i) of the Act and that (as in this case where the appellant was below 30 years of age at time of accident), the stated '16 years' multiplicand *was not a must but a specified upper limit imposed by statute* for any such award of loss of future earnings.

D [10] The evidence led in this case clearly bore out the fact that, although the appellant was now employed on a lower salary, the prospects of a 'loss of earnings' being suffered by the appellant was definite as his medical assessment indicated that he would be unable to stand for long in whatever job he was engaged in. This was a serious impairment which would limit the type of employment he would be able to secure. In the event, I held that either under the head of loss of future earnings' or alternatively, under 'loss of earning capacity', the appellant was entitled to a sum of RM54,000. The 'loss of future earnings' was derived as follows:

F - 8 years purchase *less* 2 years already compensated (6 years)
- 6 years x 12 months x RM750/- (i.e. RM1,300/- per month (actual earning) *less* RM550/- per month - (current salary)).

G THE APPEAL TO COURT OF APPEAL

H [11] The appellant's appeal is limited to that part of my decision only which despite the '16-years' purchase' stated in s 28A(2)(d)(i), I had applied an 8 years' purchase and the complaint is couched in the following words:

... terhadap nombor tahun di atas kekurangan pendapatan di bawah Akta Undang-Undang Sivil 1956 iaitu Seksyen 28A(2)(d)(i).

I REASONS FOR MY DECISION IN RESPECT OF 'LOSS OF FUTURE EARNINGS', ALTERNATIVELY, 'LOSS OF EARNING CAPACITY'

[12] The relevant provision in s 28A of the Act, is reproduced here:

28A Damages in respect of personal injury.

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- (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account —

(a) ...;

(b) ...;

B

(c) ...;

- (2) In assessing damages under this section:

(a) no damage shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

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(b) if the plaintiff's expectation of life has been reduced by the injury, the court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

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(c) in awarding damages for loss of future earnings the court shall take into account:

(i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

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(ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

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(iii) in diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured:

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(d) in assessing damages for loss of future earnings the court shall take into account that:

(i) *in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16;* and

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(ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase ...

I

[13] Counsel for the appellant in making her pitch for the 16 years' purchase to be applied as an absolute entitlement in this case, contended that s 28A(2)(d)(i) made it mandatory, that is, 16 years should be the multiplicand to be applied in all cases where the injured was below 30 years of age and where

- A it had been established that he would suffer 'loss of earnings'. She cited the Supreme Court decision in *Marappan & Anor v Siti Rahimah bt Ibrahim* as the authority for that contention. In effect, her stance was that the court had no discretion or residual powers in the matter and following the use of the word 'shall' in s 28A(2)(d)(i), the court should 'automatically' apply a 16 year multiplicand in all such situations.
- B

- [14] Counsel for the respondent in turn relied on the decision of the Court of Appeal in the case of *Sumarni v Yow Bing Kwong & Anor* [2008] 1 MLJ 608; [2008] 3 CLJ 489, to argue that there was still a discretion vested in the courts and the number of 16 years of purchase did not arise as a matter of right in all cases of injured person below age of 30 years. The court had to, it was submitted, be satisfied on good evidence that nature of injuries would have an effect of depriving the plaintiff of 'earning' which but for the injuries sustained in the accident, he could have earned.
- C
- D

- In *Sumarni's* case, the Court of Appeal had gone on to hold that on the facts of that case, 'loss of future earnings' (categorised as 'general damages') *had not been proved but there was evidence that the plaintiff will face a real or substantial risk in her earning capacity being affected in future*, and accordingly the Court of Appeal proceeded to make lump sum award of RM20,000 under the head of 'loss of earning capacity'.
- E

- [15] Section 28A was introduced by Amendment Act A602 to provide statutory guidelines and to impose certain limitation to be applied in cases of awards of damages arising from personal injury claims. The purpose obviously was to set some order and uniformity in such awards made by the courts.
- F

- Section 28A(1)* ensured that other benefits that the injured would become entitled to in the event of the accident/injury should not be taken into account in the assessment of such damages.
- G

- Section 28A(2)(a) went on impose a statutory bar against the award of damages for 'loss of expectation of life' and it must be highlighted that this was done by use of specific and emphatic words — 'no damages shall be recoverable'.
- H
- However, by 28A(2)(b) such an aspect of damages was left open for consideration in the assessment of damages for pain and suffering and could be taken into cognisance when computing the said damages for pain and suffering.

- I [16] *Section 28A(2)(c) and (2)(d)* of the Act are in respect of 'damages for loss of future earnings' and necessarily had to be read together.

In my assessment, the tone of the language used in those two statutory sub-provision ('shall take into account', in assessing damage') did not take away

the *basic principle* that the *court was vested with the authority and discretion to quantify damages* for loss of future earnings where on evidence ‘a real and assessable loss’ had been established.

A

Section 28A(2)(d) of the Act was not to be read in isolation but together with the scheme of the other provisions of s 28A and in that larger context, the court still retained the inherent authority to make ‘assessment’ and/or ‘quantification’ as may be necessary depending on the facts of each particular case before it, *provided always* that the limit of the number of years’ purchase where the injured was 30 years or less at the time of the accident, should not exceed 16 years’ purchase for any damages awarded for ‘loss of future earnings’.

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[17] I did not therefore agree with counsel for appellant that s 28A(2)(d)(i) of the Act, which read:

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured’, the number of years’ purchase shall be 16; and

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imposed an absolute 16 years purchase in all such cases, without any residual authority in the court to determine the number of years of purchase as may be reasonable in each particular case.

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In my judgment, the 16 years’ purchase stipulated therein *was the maximum numbers of years’ purchase* (multiplicand) *set by the Legislature in such cases* where the injured was below the age of thirty years at the date of the accident. This was the inevitable result that one would have when the whole of s 28A was given a purposive reading.

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[18] The emphasis of the appellant’s counsel’s argument was primarily based on the word ‘shall’ found in s 28A(2)(d)(i). which she submitted had the effect of being mandatory without any room for the court to order any lesser number of years’ of purchase.

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It is trite that ordinarily the use of the word ‘shall’ implies a mandatory obligation but that is not an absolute rule. In Bindra, *Interpretation of Statutes* (8th Ed), at pp 1029–1030 it is instructively noted as follows:

The word ‘shall’ in its ordinary signification is mandatory though there may be considerations which influence the court in holding that the intention of the Legislature was to give discretion. *But this word is not necessarily mandatory, nor always mandatory.* Whether the matter is mandatory or directory only depends upon the real intention of the Legislature which is ascertained by carefully attending to the whole scope of the statute to be construed.

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The use of the word ‘shall’ would not by itself make a provision of the Act mandatory. It is to be construed with reference to the context in which it is used. Similarly, mere use of the word ‘shall’ or the absence of it, does not decide the question whether a provision is directory or mandatory.

- A When a statute uses the word 'shall' prima face, it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the
- B impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provision, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow there from, and, above all, whether the object of the
- C legislation will be defeated or furthered.

In the case of *State of Haryana v Raghbir Dayal* [1995] SCC (1) 133, the Supreme Court of India had occasion to observe as follows:

- D The word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, or consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory *but it is the function of the court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon.*
- E The word 'shall' therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be ascribed to the word, 'shall' as mandatory or as directory, accordingly.
- F
- G [19] It was my judgment therefore that the use of the word 'shall' in s 28A(2)(d)(i) did not connote a stipulation of a mandatory nature in the sense that in all such cases a 16 years' purchase had to be applied. Taking into consideration the scope and purpose of s 28A overall, the tenor of the language used and the context in which the word 'shall' was used, I was convinced that the intention of the legislature behind s 28A(2)(d)(i) was to set a limit only to number of years' purchase to be 'considered' in each of such cases involving an injured below 30 years of age.
- H [20] As for the decision of the Supreme Court in *Marappan & Anor v Siti Rahmah bt Ibrahim*, cited by counsel for the appellant, I would, with respect, state that it does not appear from the report of the decision that the Supreme Court was invited to consider or to determine in depth or in detail the
- I implications attached to the use of the word 'shall' in s 28A(2)(d)(i) before it ruled, as it appears, that the provision in issue had 'mandatory' effect. A closer reading of that case show that the Supreme Court there dealt only with the complaint before the court that, despite the parties agreeing to a 15 years' purchase, the learned judge had made an award of 16 years' purchase. What the

Supreme Court endorsed there was only that the maximum years' of purchase allowed under that provision was 16 years' purchase and in that respect the trial court was not in error.

A

[21] Further in this instant case, the appellant was not, on the facts, in a situation where he was facing the prospects of a *total loss of future earnings*. The appellant could not stand for long but had secured a job for a lower salary. This was a case of *partial loss of future earnings*.

B

The learned sessions judge had applied a five years purchase in such circumstances.

C

Applying the principle that the court has not been deprived of its authority to make 'an assessment' of damages as adumbrated above, and considering in particular that the appellant was and could be employed gainfully, I ruled that a fair and reasonable number of years' of purchase should be eight years instead of the five years' purchase. With two years of the eight years already compensated, I held that the multiplicand to be applied in this case should be six years and accordingly substituted the award of the learned sessions judge under that head of 'loss of future earnings' (the total award accordingly as shown above worked out to be RM54,000).

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[22] This was not a case where the injured was not 'employable' at all or a total loss of future earnings was the case. There was no total loss here of the prospects of future employment and the evidence was that the appellant had secured a job at a lower salary.

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Accordingly, it was my judgment that should I be held to be wrong in my reading and the consequent order for damages for future loss of earnings pursuant s 28A(2)(d)(i). The appellant *alternatively* was entitled to be compensated, perhaps more appropriately, under the head of 'loss of earning capacity'.

G

The Court of Appeal in *Sumarni's* case, (where no case for damages to be awarded for 'loss of future earnings' was established on the facts as held there by the court), went on nevertheless to consider and to make an award for 'loss of earning capacity' as a *lump sum general damages* in the circumstances.

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Relying on that principle of law affirmed in *Sumarni's* case, where notwithstanding the rejection of a claim for 'loss of future earnings', it was still open to the court to make an award of damages under the head of 'loss of earning capacity'. I considered that a compensation in the sum of RM54,000 as damages was reasonable, adequate and fair to be awarded to the appellant in any event.

I

[23] Alternatively therefore, I held that the appellant was still to be paid

A damages in the some sum of RM54,000 under the head 'loss of earning capacity', the relevant facts related to which had been adequately established on evidence.

B [24] The orders of the learned sessions judge of 27 October 2010 was therefore varied and substituted by me as appear by the order extracted thereto.

Order accordingly.

C Reported by Kanesh Sundrum

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